

CHAPTER 03

ADVERTISING ISSUES

Learning Objectives

After this chapter, you will be able to

- Identify forms of communication that are considered advertising.
- Identify the agent/broker information that must be on advertisements to comply with TREC Rules.
- Give examples of typical copyrighted material an agent may encounter.
- Explain how to avoid copyright infringement.



§535.155 - Advertisements

- (a) Each advertisement must include the following in a readily noticeable location in the advertisement:
- (1) the name of the license holder or team placing the advertisement; and
 - (2) the broker's name in at least half the size of the largest contact information for any sales agent, associated broker, or team name contained in the advertisement.
- (b) For the purposes of this section:
- (1) "Advertisement" is any form of communication by or on behalf of a license holder designed to attract the public to use real estate brokerage services and includes, but is not limited to, all publications, brochures, radio or television

broadcasts, all electronic media including email, text messages, social media, the Internet, business stationery, business cards, displays, signs and billboards. Advertisement does not include:

- (A) a communication from a license holder to the license holder's current client; and
- (B) a directional sign that may also contain only the broker's name or logo.

Additionally,

- (4) "Contact Information" means any information that can be used to contact a license holder featured in the advertisement, including a name, phone number, email address, website address, social media handle, scan code or other similar information.

TREC Case Study 3

Susie Sales Agent posted this message on Facebook:

“HELP!!! I am looking for buyers and sellers. If you know someone who is looking, I would appreciate the referral. All friend referrals that close will receive a gift card from me. The more you refer, the more money you can make . . . If you don't know anyone looking, please keep my business in your prayers.”

DISCUSSION

1. Is this an advertisement subject to TREC advertisement rules? If so, what should be included on the Facebook page?
2. Does this arrangement violate TREC referral rules?

Social Media Litmus Test

How do you know if your postings on social media are considered an advertisement? Focus on the intent of the message. Is the message “designed to attract the public to use real estate brokerage services?” If the answer is YES, it is advertising.

Here's a handy litmus test: “If I put this on a postcard and mailed it to a neighborhood would I need to add my brokerage name, etc.?” If the answer is yes, all of the advertising rules apply.

Using Copyrighted Material

As listing content, like photos of a property, becomes more and more publicly accessible, real estate agents and brokers have increased exposure to copyright infringement. Improper use of listing content can create legal problems. Therefore, it is crucial that you know what rights you have, and what you can and cannot do with someone else's listing content.

Copyright Definition

A copyright is a form of legal protection provided to authors of “original works of authorship” (a work that is independently created and possesses at least some minimal degree of creativity).

The work must be fixed in a tangible form of expression, meaning it should be in a sufficiently permanent form such that the work can be perceived, reproduced, or communicated for more than a short time. Things like books, plays, paintings, and photographs can all have copyright protection, but you cannot protect things like ideas, facts, or short phrases or slogans.

Copyright Ownership

Generally, the author who created the work, like the writer, the painter, or the photographer is the owner. However, when a work is made for hire, the author is not the person who actually created the work. Instead, the party that hired the individual is considered the author and the copyright owner of the work. For instance, when the work is created by an employee within the course and scope of his or her employment, the employer is considered the author and owner of the work.

Copyright Ownership Rights

Copyright owners own certain exclusive rights, like the right to reproduce the work, the right to distribute the work, the right to display the work, and the right to create new works from the original work. A work generated from the original work is known as a derivative work.

Sharing Copyright Ownership Rights

A copyright owner can grant or share certain rights with another through an assignment or license agreement.

- * **Assignment:** When a copyright owner transfers ownership of the copyright to another person or entity. This is similar to a sale of a home.
- * **License:** When a copyright owner only transfers some of his or her rights for a limited period of time or a limited purpose. With a license, you transfer your rights in the copyright to another person or entity, but you retain actual ownership of the copyright. This is similar to a lease of a home. Many license agreements will be non-exclusive, meaning the copyright owner can license the work to many different people or entities.

Sometimes, website owners may include a license in their terms of use or through an agreement that comes in the form of a pop-up box that must be clicked to accept.

Copying and Use of Information from the Commission's Website

Information may be copied from the Commission's website and posted on a third-party website, so long as the information is not presented in a misleading way and does not imply that the third-party website is endorsed by the state of Texas or the Commission. If information from the Commission's website is copied and posted on a third-party website, that website must identify the Commission as the source of the information and include the Internet address from which the information was copied and the date the information was copied from the Commission's website.

Copyright Infringement

Copyright infringement is the violation of one or more of the copyright owner's exclusive rights. A copyright infringement case requires proof of: (1) ownership of a valid exclusive copyright right, and (2) defendant's infringement of that right. Basically, copyright infringement is using a work without permission. You can only sue for infringement if you have registered your work with the U.S. Copyright Office.

Fourth Estate Public Benefit Corporation v. Wall-Street.com, 586 U.S. ____ (2019); 139 S. CT. 881

The federal Copyright Act of 1976 prohibits a copyright owner from suing for copyright infringement until "registration of the copyright claim has been made." Prior to the Fourth Estate decision, some courts interpreted this to mean that simply filing a copyright application for a work was enough to file a copyright infringement suit. However, other courts held that actually obtaining a registration at the U.S. Copyright Office was required before suing. The first interpretation was more favorable to copyright plaintiffs because the actual registration can take several months.

In this case, Fourth Estate sued Wall-Street.com for copyright infringement after Wall-Street.com posted Fourth Estate's articles without permission. However, these articles were not registered at the U.S. Copyright Office.

The U.S. Supreme Court held that copyright owners must obtain a copyright registration from the U.S. Copyright Office before suing for copyright infringement, finding that "registration has been made" can only mean one thing: that the Copyright Office's act of granting registration and not filing an application determines whether registration has been made.

This decision may encourage some copyright owners to register their works more promptly and may delay infringement suits.

Protection From Copyright Infringement Claims

Copyright issues will typically impact real estate license holders through their use of photographs when marketing the property. If a license holder uses listing content in a way that is inconsistent with the rights granted to that license holder, then the copyright owner might sue for copyright infringement. Therefore, it is critical that license holders ensure that when, for instance, they upload a photographer's photograph to the MLS or when they post someone else's video on their website, they have the right to do so. Here are some ways license holders can protect themselves:

- * Do not use content, like a photograph, unless you have permission.

- * Review existing agreements so that you know what rights you have and make sure your use complies.
- * Ensure future agreements, like license agreements, have given you the necessary rights.

Copyright Scenario 1

A seller and listing broker enter into a listing agreement for the sale of property. The listing broker enters into a non-exclusive license agreement with a photographer to take photos of the property for marketing purposes.

The listing broker uploads the photos to the MLS. The property never sells and the seller and listing broker agree to terminate their agreement. The seller decides to try again and enters into a new listing agreement with a new listing broker. The new listing broker finds the photographs of the property and decides to reuse them.

DISCUSSION

1. Is it okay for the second listing broker uses the photos?
2. Other than copyright law, what other rules and regulations may you need to consider when using the photos?
3. The photos were posted on the MLS. Can't the second listing broker reuse them for her listing?
4. What should the second listing broker do to make sure they can legally reuse the photos?

Copyright Scenario 2

An agent has decided she wants to create a website. She lives and works in San Antonio so she wants to use photographs of San Antonio landmarks on her website. She searches online and finds the perfect photo of the Alamo, taken by a well-known photographer. She downloads the photo and posts it on her website, making sure to credit the photographer.

DISCUSSION

1. Should the agent have posted the photo?
2. Does the fact that the agent gave credit to the photographer matter?
3. What should the agent do to obtain proper authorization to use the photo?